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RIPARIAN AND APPROPRIATION RIGHTS TO THE USE OF WATER IN WASHINGTON

THE BACKGROUND

The Federal Government acquired undisputed title to the northwestern corner of the United States in the year 1846.¹ Except for accrued rights² this land became part of the public domain of the United States for disposition by the Government through its Congress.³ When the Territory of Washington was created by the Organic Act of March 2, 1853, it was expressly provided therein that the legislative power of the Territorial Legislature should extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States.⁴ Under the Constitution, the Federal Government had exclusive power to dispose of the public domain;⁵ and when the Territory of Washington became a state in the year 1889, it was expressly declared in its constitution that the people inhabiting the State disclaimed all right and title to the unappropriated public lands of the United States lying within the state boundaries.⁶

¹ The federal government may acquire territory under its treaty making power. *Amer Ins. Co. v. Canter* 1 Pet. 511 (1825). The United States government and England claimed this territory by right of discovery England demanded that the Columbia River be the boundary line. The United States demanded "54° 40' or fight." Finally in the treaty concluded June 15, 1846 and proclaimed by the President August 5, 1846, 49° was agreed upon. For earlier history, see *Lounsdsale vs. Parrish*, 62 U. S. (21 How.) 293 (1859).

² The fee title acquired is ordinarily subject to all bona fide grants to individuals prior to the treaty of cession and to the right of occupancy by Indians. Hence, a grant by the United States made before extinguishment of the Indian right remains subject thereto, but the title becomes absolute in the grantee whenever the Indian right is extinguished. *Clark v. Smith*, 13 Pet. 195 (1839) *Beecher v. Wetherby*, 95 U. S. 517 (1877) I KINNEY ON IRR. AND WATER RIGHTS (2 ed.) §§402, 404, 405.

³ U. S. Const. Art. IV §3 Clause 2: "The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" See *United States v. Fitzgerald*, 15 Pet. 407 (1841).

⁴ Rem. Comp. Stat. p. 23 §6.

⁵ Note 3, *Supra*.

⁶ Const. of Wash. Art. XXVI, Art. I §2.

The Federal Government disposed of its public domain in various ways.⁷ It made grants of land for purposes of internal improvement. It granted a portion of its public lands for the use of public schools to be established in states and territories. It granted land for townsites. It disposed of land through the General Land Office under preemption and homestead acts, under laws relating to public and private sales, under laws permitting issuance of military land warrants and under the Desert Land Act of 1877. In addition to land acquired from the Federal Government by individuals, both the Territory and State of Washington received lavish grants for school⁸ and other purposes.⁹

The need for water in this state was destined to play a vital part in the development of the law of water rights. While west of the Cascade Range there was relatively little or no shortage of available water, east of the Cascades the problem was serious. In many parts water was scarce and much capital required to make it available for use. Where, however, water was available in artesian basins, streams or rivers,¹⁰ conflicts arose among competing users. Regrettable as those conflicts were, they did, however, cause the legislature and courts to regulate and pass upon claims made. In so doing, the law of water rights was surely and necessarily developed.

TERRITORIAL LAW

The Territory of Washington could, subject to Federal law, adopt any rule with respect to rights in water which it chose to adopt. Except for Federal law, there were no constitutional or common law limitations.¹¹ Federal restrictions generally did, however, exist. Congressional legislation applicable since September 1, 1848, to the Territory of Oregon was continued in full force within the Territory of Washington by the Organic Law of March 2, 1853.¹²

⁷ The methods are summarized in I KINNEY ON IRR. AND WATER RIGHTS (2 ed.) §408 et seq.

⁸ The Organic Act of 1853, sec. 20 (Rem. Comp. Stat. p. 21) set aside sections 16 and 36 of each township for school purposes. It was further provided that if such sections were occupied by actual settlers, the county commissioners of the affected counties might locate other lands in equal amounts in lieu of the occupied sections. These are the so called "indemnity school lands." See *In Re Waters of Doan Creek*, 125 Wash. 14, 215 Pac. 343 (1923). The Enabling Act of 1889 (Rem. Comp. Stat. p. 30) contained numerous grants for school purposes. See sections 10, 11, 13, 14, 16, 17, 18, 19. The State Constitution (1889) contained provisions safeguarding the lands granted. See Art. XVI and IX.

⁹ Enabling Act (1889) §12 granted land to aid the State in the erection of public buildings at the state capital. Section 15 granted land for erection of a penitentiary.

¹⁰ II KINNEY ON IRR. AND WATER RIGHTS (2 ed.) §2076, III FARNUM ON WATER AND WATER RIGHTS §653. An apt illustration of conflict is found in *Huberman et al. v. Sander et al.*, 66 Wash. Dec. 337 (1932).

¹¹ III FARNUM ON WATER AND WATER RIGHTS p. 2022. I KINNEY ON IRR. AND WATER RIGHTS (2 ed.) §593, See WIEL ON WATER RIGHTS (2 ed.) Ch. II.

¹² Org. Act of Terr. of Washington §12.

Aside from the Constitution, what was that law, so far as is here relevant? When the Oregon Territory was established by Congress on August 14, 1848, Indians, missionary stations, and British subjects were among those claiming rights in that Territory. In the treaty between Great Britain and the United States in 1846, settling the boundaries of the northwest corner of the United States, it was provided by Article Three thereof that the possessory rights of the Hudson Bay Company and of all British subjects already in occupation of land be respected.¹³ The Act of Congress setting up the Territory of Oregon not only preserved existing property rights generally,¹⁴ but expressly safeguarded the rights of Indians and missionary stations;¹⁵ and in the Donation Land Act of September 27, 1850, making land grants to settlers of public lands in the Territory of Oregon it was provided that those claiming rights under the treaty with Great Britain relative to the Oregon Territory might elect to do so rather than to claim under the Act of Congress.¹⁶

These accrued rights under acts of Congress the territorial law of Washington was compelled to respect. Thus far, however, there was no specific legislation relating to water rights. There were other Federal laws, however, affecting that subject. The Supreme Court of the United States established the rule that the legal effect to be given to a grant of land by the Federal Government within the boundaries of a territory or state was to be determined by the law of that territory or state in the absence of a reservation to the contrary.¹⁷ The Federal Government, although entitled to riparian rights on its public lands, permitted local state or territorial law to govern the question of water rights when such public lands passed into private ownership.¹⁸ Nevertheless, the Federal Government retained its paramount control over navigation.¹⁹ Accordingly, in

¹³ This stipulation was early held not to constitute a grant to such subjects *Cowena et al. v. Hannah et al.*, 3 Or. 465 (1869). Prior to Act of Congress of Sept. 27, 1850 (9 Stat. at L. 496) there were no means of acquiring title to land in "Oregon" effective against the United States. See *Lounsedale v. Parrish*, 62 U. S. (21 How.) 293 (1858) reviewing the history of the matter.

¹⁴ Act of August 14, 1848 (1 LORD'S OREGON LAWS p. 46).

¹⁵ Sec. 14 of Act extended Ordinance of 1787 to Oregon; 9 Stat. 323 §14.

¹⁶ Sess. L. of Washington 1854-56, p. 44, 45, 1 LORD'S OREGON LAWS, p. 48.

¹⁷ *Harden v. Shedd*, 190 U. S. 508, 23 S. Ct. 685, 47 L. Ed. 1156 (1903) *Brewer, Elliott Oil & Gas Co. v. U. S.*, 260 U. S. 77, 43 S. Ct. 60; 67 L. Ed. 140 (1922) *Bernot v. Morrison*, 81 Wash. 538, 143 Pac. 104 (1914) *Hill v. Newell*, 86 Wash. 227 at p. 229, 149 Pac. 951 (1915) 1 KINNEY ON IRR. AND WATER RIGHTS (2 ed.) §413 et seq., 447-449.

¹⁸ *U. S. v. Rio Grande Dam etc. Co.*, 174 U. S. 690, 19 S. Ct. 770, 43 L. Ed. 1136 (1899) *Gutierrez v. Alhaquerque etc. Co.*, 188 U. S. 545, 23 S. Ct. 338, 47 L. Ed. 538 (1903) 1 KINNEY ON IRR. AND WATER RIGHTS (2 ed.) §406, See WIEL ON WATER RIGHTS (2 ed.) §32.

¹⁹ *United States v. Rio Grande Dam etc. Co.*, note 18 *supra*. *Hewitt-Lea Lumber Co. v. King County*, 113 Wash. 431, 194 Pac. 377 (1920).

permitting local law to govern in those territories or states wherein the doctrine of riparian rights had not been abolished, a grant of land bordering upon or divided by a natural stream, carried with it as an incident to the fee granted, the rights of a riparian owner to the use of the water.²⁰ So far as public lands in arid or semi-arid regions were concerned, however, difficulties arose in the application of this doctrine of riparian rights. Land without water in such regions was practically worthless. Again, the discovery of gold in California necessitated the use of water to work mining claims. Settlers began appropriating water on the public domain for agricultural and mining purposes on the basis of their needs rather than on the basis of riparian rights. Indeed, only by permitting such appropriation could the settlement of vast areas of the public domain be encouraged.²¹ To protect water appropriators on the public domain against being disturbed in the enjoyment of their water, Congress passed an act on July 26, 1866,²² making the national ownership of the public domain over and adjoining which streams of water flowed, subject to the rights of appropriators of water on such streams.²³ Hence, grantees of public lands took title to such lands subject to the rights of prior water appropriators. In the amendatory act of July 9, 1870, it was expressly provided, "that all patents granted or preemptions of homesteads allowed, shall be subject to any vested and accrued water rights"²⁴ The doctrine of appropriation was carried still further by Congress in

²⁰ *Union Mill & M. Co. v. Ferris*, Fed. cas. No. 14371, 2 Sawy 176 (1872) *Crandall v. Woods*, 8 Cal. 136 (1857) *Sturr v. Beck*, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761 (1890) KINNEY ON IRR. AND WATER RIGHTS §188; Where local law had abolished riparian rights, local law was enforced. *Snake Creek M. & T. Co. v. Midway Irr. Co.*, 260 U. S. 596, 43 Sup. Ct. 215, 67 L. Ed. 423 (1923). See *Hough v. Taylor* 110 Wash. 361, 188 Pac. 458 (1920) involving riparian rights on Yakima Indian Reservation.

²¹ II KINNEY ON IRR. AND WATER RIGHTS (2 ed) §805, I *ibid.* §611 et seq., III FARNUM ON WATER AND WATER RIGHTS, p. 2017.

²² 14 Stat. at L. 251, Comp. Stat. §4647. Sec. 9 provided.

"Wherever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same."

See 43 U. S. C. A. §661 et seq. See *State ex rel. Olding v. Stampfly*, 69 Wash. 368, 125 Pac. 148 (1912) applying statute to school lands followed in *In re Doan Creek*, 125 Wash. 14, 215 Pac. 343 (1923), and *In re Crab Creek and Moses Lake*, 134 Wash. 7, 235 Pac. 37 (1925), overruling *Colburn v. Winchell*, 97 Wash. 27, 165 Pac. 1078 (1917)

²³ In *Broder v. Natoma Water Co.*, 101 U. S. 274, 25 L. Ed. 790 (1879) it was held that rights of water appropriators on public domain which the Government by its conduct had recognized and encouraged would be protected even without congressional legislation. In *Isaacs v. Barber* 10 Wash. 124, 38 Pac. 871 (1894) it was held that the Act protected appropriations of water made prior to the Act.

²⁴ 16 Stat. at L. 217 Comp. St. §4648.

the enactment of the Desert Land Act of March 3, 1877.²⁵ In that act, which was applicable to Pacific Coast states and territories, and which in no way repealed the previous acts, the use of all unappropriated water upon desert lands in the public domain in non-navigable beds of water was to be held free "for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights."²⁶

The territorial law was bound not only to respect water rights arising under these Federal statutes, it was also bound for a time to respect such enactments of the Oregon Territorial Legislature as were applicable to the Territory of Washington at the time that the Organic Act went into effect.²⁷ So far as water rights were concerned, however, neither the Territorial Legislature of Oregon²⁸ nor the Oregon Territorial Court²⁹ had touched the matter in any way whatsoever prior to 1856, when the Territorial Legislature of

²⁵ 19 Stat. at L. 377 Comp. Stat. §4674, 44 Cong., Sess. 2; Chap. 107. Sec. 1. After providing for the sale of desert lands in small tracts to persons effecting reclamation thereof by an actual appropriation and use of water the Act provided:

"All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights."

²⁶ This Act was amended Mar. 3, 1891 (26 Stat. at L., 1096, 1097). This, and subsequent amendments are discussed in III KINNEY ON IRR. AND WATER RIGHTS (2 ed.) 1912 §1290 et seq., LONG ON IRRIGATION (2 ed.) 1916 §305 et seq. For present law, see 43 U. S. C. A. §321 et seq. In *Still v. Palouse Irr & Power Co.*, 64 Wash. 606, 117 Pac. 466 (1911) and *Bernot v. Morrison*, 81 Wash. 538, 143 Pac. 104 (1914), the court refused to follow *Hough v. Porter*, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728 (1908), and held that the Act applied only to desert lands and did not abrogate the law of riparian rights. For other federal legislation, see 43 U. S. C. A. §371 et seq. dealing with reclamation and irrigation of land by federal government; 16 U. S. C. A., sec. 791 containing the Federal Water Power Act. State laws remain unaffected, 16 U. S. C. A., sec. 821, 43 U. S. C. A., sec. 383. The Carey Act authorizing grants of desert land to states for reclamation purposes is set out in 43 U. S. C. A. §641 et seq. Generally, see Title 43 of U. S. C. A. Federal law is discussed in I KINNEY ON IRR. AND WATER RIGHTS (2 ed. 1912), §416 et seq., 624 et seq., III *ibid.* §1235 et seq., §1309, et seq., §1312 et seq., WIEL ON WATER RIGHTS (2 ed.) p. 52. As to water rights in forest reserves, see *Brown v. Ole Elum*, 143 Wash. 606, 255 Pac. 961 (1927) *Utah P & L. Co. v. U. S.*, 243 U. S. 389, 37 S. Ct. 387, 61 L. Ed. 791 (1917).

²⁷ Note 12, *supra*.

²⁸ In 1864, the Oregon Legislature passed an act permitting miners to make local laws with respect to possession of water rights. See *In re. Hood River*, 227 Pac. (Ore.) p. 1086 (1924). But this was after the Act of 1856 passed by the Territorial Legislature of Washington referred to in note 30 *infra*.

²⁹ The first Oregon case considering the doctrine of riparian rights according to *Hough v. Porter*, 98 Pac. (Ore.) p. 1099, was *Taylor v. Welch*, 6 Ore. 198 (1876). The leading case is *Weiss v. Oregon Iron & Steel Co.*, 13 Or. 496, 11 Pac. 255 (1886).

Washington abrogated the Oregon law then in force in the Washington territory and provided for the recognition of the common law³⁰

Consequently, the Territory of Washington had a hand comparatively free from overriding legislation in determining what the nature of water rights should be. The Territorial Court of Washington had no opportunity, however, to discuss the nature of water rights existing in the Territory, for no case seems to have reached the court involving water right questions. As for the Territorial Legislature, little legislation of importance specifically concerned with the nature and acquisition of water rights was enacted except toward the last days of the Territory.³¹ Legislation protecting wells, springs, and reservoirs from pollution,³² licensing ferries across lakes or streams, giving abutting owners preference,³³ permitting building of wharves³⁴ and bridges,³⁵ prohibiting the discharge of ballast in navigable waters,³⁶ preventing and removing the obstruction of rivers,³⁷ changing the channel of a stream,³⁸ authorizing the creation of water companies,³⁹ ⁴⁰ indicates the character of legislation enacted. Nevertheless, interest in the beneficial use of water was apparent. In 1873 an act regulating irrigation and water rights in Yakima County was passed.⁴¹ In 1875 an act authorizing the construction of ditches and water courses appeared⁴² and in 1879 appropriation of water upon making due compensation was authorized.⁴³

THE STATE LAW

So far as concerns the subsequent history of the matter, nothing important was done until Washington became a state. The State Constitution which went into effect in 1889⁴⁴ provided that "the use

³⁰ Sess. L. 1855-6, p. 2, provided *inter alia* "That the common law, in all civil cases, except where otherwise provided by law shall be in force."

³¹ Sess. L. 1879, p. 124, 134, also *ibid.* '69 p. 340 §§ 30, 31, *ibid.* '73 p. 408, §§ 28, 29; Code '81 §2448; *ibid.* '83, p. 45, §8.

³² Sess. L. 1854-56, p. 79, §25.

³³ Sess. L. 1854-56, p. 353, §3.

³⁴ Sess. L. 1854-56, p. 357, *ibid.* '60, p. 326, *ibid.* '63, p. 531, Code 1881, §3271.

³⁵ Sess. L. 1854-56, p. 361.

³⁶ Sess. L. '54, p. 94, *ibid.* '55, p. 34, *ibid.* '56, p. 11, *ibid.* '77, p. 285, Code '81, §918.

³⁷ Sess. L. 1862, p. 301, Local and Private Laws, p. 61, also *ibid.* '54, p. 94, Code 1881, §919; *ibid.* '88, p. 190; *ibid.* 1857-58, p. 85, *ibid.* '68, pp. 65 and 84.

³⁸ Sess. L. '67, p. 215 (for stock and other purposes).

³⁹ Code 1881, p. 423.

⁴⁰ See notes 41-43 *infra*.

⁴¹ Sess. L. '73, p. 520.

⁴² Sess. L. 1875, p. 92; Code 1881, pp. 434-437.

⁴³ See note 31 *supra*.

⁴⁴ The Constitution was ratified by the people at an election held October 1, 1889, and the President of the United States proclaimed the admission of the State of Washington into the Union on November 11, 1889. See Rem. Comp Stat., p. 41.

of the waters of this state for irrigation, mining and manufacturing purposes shall be deemed a public use."⁴⁵ In 1890 the State Legislature passed an act providing for the use of water for irrigation purposes and providing for the condemnation of rights of way for ditches to carry water for such purposes.⁴⁶ Section 1 provided

"Any person is entitled to take from any of the natural streams or lakes in this state water for the purposes of irrigation, not heretofore appropriated or subject to rights existing at the time of the adoption of the constitution of this state, subject to the conditions and regulations imposed by law, Provided, That the use of Waters at all times shall be deemed a public use and subject to condemnation as may from time to time be provided for by the Legislature of this state."⁴⁷

In 1891 the Legislature passed an act concerning the appropriation of water for irrigation, mining and manufacturing purposes, in which Section 1 provided.

"The right to the use of water in any lake, pond or flowing spring in this state, or the right to the use of water flowing in any river, stream or ravine of this state, for irrigation, mining or manufacturing purposes, or for supplying cities, towns or villages with water, or for water-works, may be acquired by appropriation, and as between appropriations the first in time is first in right."

It was further provided by this act that water appropriation rights might be the subject of sale and that appropriations made prior to the act and water rights existing at the date of the passage of the act should not be prejudiced.⁴⁸

THE CASE OF BENTON VS. JOHNCOX

The effect of the foregoing legislation upon the doctrine of riparian rights was not considered by the Supreme Court of Washington until the famous case of *Benton vs. Johncox* in 1897.⁴⁹ Meanwhile the Legislature in 1891 had passed an act making the common law applicable in Washington if not incompatible with the institutions and condition of society in this state.⁵⁰ Again the Supreme Court in a number of decisions beginning with *Thorpe vs. The Tenem Ditch Company*⁵¹ in 1889 had considered the question

⁴⁵ See Rem. Comp. Stat., p. 120; Const. Art. I § 16, *ibid.* p. 49.

⁴⁶ Sess. L. 1889-90, p. 706. For other water right legislation see Sess. L. '89-'90, pp. 652, 671, 729.

⁴⁷ Sec. 44 of this Act assumes the existence of riparian rights. See Sess. L. '89-'90, p. 719.

⁴⁸ Sess. L. 1891, p. 327. An illustration of appropriation under this act is *Grant Realty Co. v. Ham Yearsley & Ryne*, 96 Wash. 616, 165 Pac. 495 (1917).

⁴⁹ 17 Wash. 277, 49 Pac. 495 (1897). For subsequent history of Ahtanum Creek, see *In re Ahtanum Creek*, 139 Wash. 84, 245 Pac. 758 (1926) *State ex rel. Cope v. Barnes*, 158 Wash. 648, 291 Pac. 710 (1930).

⁵⁰ Sess. L. 1891, p. 31. See note 30, *supra*.

⁵¹ 1 Wash. 566, 20 Pac. 588 (1889).

of rights in water. In those decisions, the rights of water appropriators on the public domain were examined and protected;⁵² besides this, however, the court recognized⁵³ and protected the water rights of a riparian owner by granting injunctive relief and by recognizing the right to recover at least nominal damages for an interference with riparian rights.⁵⁴ In the *Benton* case the whole subject of riparian rights was examined and the suitability of their recognition in view of the needs of the State considered. After examining authorities including most of the earlier Washington cases, after citing the 1891 act establishing the common law as the rule of decision in this state, and after rejecting the argument that the water needs of Washington required a rejection of the riparian right doctrine, the court protected the riparian rights of a grantee from the Federal Government against a subsequent appropriator of water. The court further held that nothing in the acts of 1873, 1890, and 1891 militated against the recognition of riparian rights. The effect of the constitutional provision making the use of the waters of the state for certain purposes a public use and the effect of the Desert Land Act were not considered.⁵⁵ When, however, these matters were presented to the Supreme Court, it found nothing in them that required a departure from its earlier view.⁵⁶

THE DOCTRINE OF RIPARIAN RIGHTS

The doctrine of riparian rights to the use of water became a subject of further explanation in the cases that followed. It came to be understood that the owner of lands abutting upon a non-navigable body of water was entitled by virtue of his riparian rights to the natural and accustomed flow of such water without unnecessary

⁵² *Thorpe v. Tenem Ditch Co.*, 1 Wash. 566, 20 Pac. 588 (1889) *Ellis v. Pomeroy Impt. Co.* 1 Wash. 572, 21 Pac. 27 (1889) *Geddis v. Parrish*, 1 Wash. 587, 21 Pac. 314 (1889) *Isaacs v. Barber* 10 Wash. 124, 38 Pac. 871 (1894) *Wold et al. v. May*, 10 Wash. 157, 38 Pac. 875 (1894) The rule of these cases has been consistently recognized. See *In re Sinlaheken Creek*, 162 Wash. 635, 299 Pac. 649 (1931).

⁵³ *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28 (1892) *Rigney v. Tacoma etc. Co.*, 9 Wash. 576, 38 Pac. 147 (1894) In *Wintermute v. Tacoma L. & W. Co.*, 3 Wash. 727, injunction was denied. See note 117 *infra*. *Geddis v. Parrish*, 1 Wash. 587, 21 Pac. 314 (1889) appears to contain the earliest discussion of riparian rights in this state although the rights were not called riparian. See also *Meyer v. Tacoma Light & Water Co.*, 8 Wash. 144, 35 Pac. 601 (1894), involving riparian right to underground water.

⁵⁴ *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254 (1894) involved action by riparian owner for damages resulting from diversion of water from a stream.

⁵⁵ See notes 25 and 45 *supra*.

⁵⁶ *Still v. Palouse etc. Co.*, 64 Wash. 606, 117 Pac. 466 (1911) *Bernot v. Morrison*, 81 Wash. 538, 143 Pac. 104 (1914) See II KINNEY ON IRR. AND WATER RIGHTS: (2 ed.) §817.

diminution⁵⁷ or pollution.⁵⁸ Such rights did not, however, extend to navigable bodies of water as against the State or one claiming under its appropriation laws.⁵⁹ But where applicable, the upper riparian owner was permitted to use all the water of a stream, if necessary, for domestic purposes, i. e., culinary and household purposes, watering a garden, cleaning, washing, feeding, and supplying the ordinary quantity of cattle.⁶⁰ For other than domestic purposes, such as irrigation and power, it was recognized that only a reasonable and beneficial use might be made.⁶¹ The amount of water that would be reasonable would depend upon the circumstances varying

⁵⁷ For cases prior to *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495 (1897), see notes 52-54 *supra*. Subsequent cases include *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735 (1901) *Nesalhou v. Walker*, 45 Wash. 621, 88 Pac. 1032 (1907), in which riparian rights regarded as rule of property. *Tacoma E. R. Co. v. Smithgall*, 58 Wash. 445, 108 Pac. 1091 (1910) *Mason v. Yearwood*, 58 Wash. 276, 108 Pac. 608 (1910) *Still v. Palouse Irr. & P. Co.*, 64 Wash. 606, 117 Pac. 466 (1911) *Miller v. Baker*, 68 Wash. 19, 122 Pac. 604 (1912) *Sandar v. Bull*, 76 Wash. 1, 135 Pac. 489 (1913) *State ex rel. Davis v. Supr. Ct.*, 84 Wash. 252, 146 Pac. 609 (1915) *Domrese v. City of Roslyn*, 101 Wash. 372, 172 Pac. 243 (1918) *Hough v. Taylor* 110 Wash. 361, 188 Pac. 458 (1920) *Smith v. Nechanicky*, 123 Wash. 8, 211 Pac. 880 (1923). Any diversion though resulting in mere nominal damage is a violation of riparian rights of lower owners. *Rigney v. Tacoma etc. Co.*, 9 Wash. 576, 38 Pac. 147 (1894) *Mally v. Weidensteiner*, 88 Wash. 398, 153 Pac. 342 (1915).

⁵⁸ *Tacoma Eastern R. Co. v. Smithgall*, 58 Wash. 445, 108 Pac. 1091 (1910) *Packwood v. Mendota Coal & Coke Co.*, 84 Wash. 47, 146 Pac. 163, L. R. A. 1915 D. 911 (1915). Necessary pollution arising out of domestic uses is permitted. *McEvoy v. Taylor*, 56 Wash. 357, 105 Pac. 851, 26 L. R. A. (N. S.) 222 (1909).

⁵⁹ *State ex rel. Ham etc. v. Supr. Ct.*, 70 Wash. 442, 126 Pac. 945 (1912) *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811 (1913) see *Port of Seattle v. Ore. & W. R. R. Co.*, 255 U. S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921), in which the Court said:

"The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation. Subject to that right, Washington became upon its organization as a state, the owner of the navigable waters within its boundaries and of the land under the same."

However, vested rights of a littoral owner upon a navigable lake to the uninterrupted flow of water derived under a patent issued prior to the adoption of the State Constitution, continues unimpaired. *Madison v. Spokane Valley Land & Water Co.*, 40 Wash. 414, 82 Pac. 718 (1905) *Hewitt-Lea Lumber Co. v. King County*, 113 Wash. 431, 194 Pac. 377 (1920).

⁶⁰ See *Hunter v. Langenour* 140 Wash. 558, 250 Pac. 41 (1926). cf. *Hayward v. Mason*, 54 Wash. 653, 104 Pac. 141 (1909).

⁶¹ See note 60, *supra*, *Nesalhou v. Walker* 45 Wash. 621, 88 Pac. 1032 (1907) *Nelson v. Spooner*, 46 Wash. 14, 89 Pac. 155 (1907) *Kalama Elec. Light & P. Co. v. Kalama Driving Co.*, 48 Wash. 612, 94 Pac. 469 (1908) held that the use of water for power purposes is a riparian use. It is also a public use for eminent domain purposes. *State ex rel. Chelan Co. v. Supr. Ct.*, 142 Wash. 270, 253 Pac. 115 (1927). In *State ex rel. Kennewick Irr. Dist. v. Supr. Ct.*, 118 Wash. 517, 204 Pac. 1 (1922) it was held in a condemnation proceeding that the use of water for irrigation purposes was superior to use for power purposes, and there was *dicta* to the effect that domestic uses were superior to irrigation uses.

⁶² See *Hunter Land Co. v. Langenour* 140 Wash. 558, 250 Pac. 41 (1926) 27 R. C. L. p. 1083.

in each case.⁶² This riparian right was not a mere easement, but an incident of the land itself—real property.⁶³ As such real property, it was severable, salable and condemnable.⁶⁴ Though transferable, a riparian right could not be sold so as to enable the purchaser to use water on non-riparian land.⁶⁵ The riparian owner did not own the water itself—his was only the right to use—a usufruct in the water.⁶⁶ But beneficial use was no more required to preserve such right than the use of any other real property was required to retain ownership.⁶⁷

Quite different, however, was the doctrine of appropriation as it came to be applied under the water appropriation statutes. The rights of the riparian owner to the use of water were co-equal. The rights of the appropriator were successive—*qui prior est qui prior tempus est*.⁶⁸ The riparian owner had a mere usufruct in the water. The appropriator had a conditional ownership in the water itself—an ownership that enabled him, if he so desired, to sell the water for use on non-riparian land.⁶⁹ The riparian owner owned his water right even though he made no beneficial use of the water whatsoever. The appropriator, however, gained his right by diligent and beneficial user.⁷⁰ The amount of water available to the riparian owner depended on the circumstances including the need of other riparian owners. The amount of water to which the appropriator was en-

⁶² *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495 (1897) *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28 (1892) *Rigney v. Tacoma Light & Power Co.*, 9 Wash. 576, 38 Pac. 147 (1894) *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735 (1901)

⁶³ See *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 576, 38 Pac. 147 (1894) *Everett Water Co. v. Powers*, 37 Wash. 143, 79 Pac. 617 (1905) *Northwestern Elec. Co. v. Lyle Etc. Co.*, 71 Wash. 384, 128 Pac. 674 (1912) *Pleasant Valley Irr. & P. Co. v. Barker* 98 Wash. 459, 167 Pac. 1092 (1917) *United Paper Board Co. v. Iroquois Etc. Co.*, 226 N. Y. 38, 123 N. E. 200 (1919). cf. Sess. L. of Wash. 1903, pp. 113, 116, recognizing water right as purchaseable; Sess. L. of Wash. 1891, p. 327, Sec. 6, recognizing transferable character of water appropriation right.

⁶⁴ The weight of authority supports this view. See Ann. 14 A. L. R. 330. *Rigney v. Tacoma Etc. Co.* 9 Wash. 576, 38 Pac. 147 (1894) *Kirkland v. Cochrane*, 87 Wash. 528, 151 Pac. 1082 (1915) *Van Dissel v. Holland Etc. Co.*, 91 Wash. 239, 157 Pac. 687 (1916) *Madison v. Spokane Valley Etc. Co.*, 40 Wash. 414, 82 Pac. 718 (1905) *Longmire v. Yakima Etc. Co.* 95 Wash. 302, 163 Pac. 782 (1917).

⁶⁵ *Rigney v. Tacoma Etc. Co.*, 9 Wash. 576, 38 Pac. 147 (1894)

⁶⁶ See note 66 *supra*: "Use does not create, and disuse cannot destroy or suspend it."

⁶⁷ *Hunter Land Co. v. Langenour* 140 Wash. 558, 250 Pac. 41 (1926) cf. *In re Icicle Creek*, 159 Wash. 524, 294 Pac. 245 (1930). See *Haberman et al. v. Sander et al.*, 66 Wash. Dec. 337, 345 (1932).

⁶⁸ See note 70 *infra*. In 19 Idaho 727, 115 Pac. 488, 490 appropriators right was held to be real property. See *Dunsmuir v. Port Angeles Gas etc. Co.*, 24 Wash. 104, 63 Pac. 1095 (1901) cf. *Beetchanow v. Bartholet*, 162 Wash. 119, 298 Pac. 335 (1931)

⁶⁹ In *re Alpowa Creek*, 129 Wash. 9, 224 Pac. 29 (1924) reviews the authorities.

titled included his reasonable needs within a reasonable future time irrespective of the needs of other appropriators.^{71 72}

THE LEGISLATURE

While the doctrine of riparian rights was being elaborated, the Legislature had been passing many statutes relating to the beneficial use of water. The importance of the subject becomes at once apparent from even a cursory review of the principal statutes.

In 1890, it passed an act providing for the organization and government of irrigation districts, a subject which was subsequently to prove a prolific source of legislation.⁷³ In 1899, it passed an act providing for the condemnation and appropriation of water for irrigation and mining purposes;⁷⁴ and another act designed to prevent pollution of city water supply.⁷⁵ Two years later it passed an act regulating the flow of water from artesian wells with a view to conserving such water.⁷⁶ Later, legislation creating river improvement districts was enacted.⁷⁷ In 1905, an act was passed providing for the irrigation and improvement of lands granted to the State of Washington;⁷⁸ and an act passed empowering the United States government to acquire property and water rights in connection with its reclamation of arid lands policy.⁷⁹ In 1907, the legislature passed a statute designed to regulate, distribute and measure stored and flowing waters.⁸⁰ Two years later, an act was passed for the purpose of protecting structures used in utilizing water and making it a crime to steal water from an irrigation ditch.⁸¹ In 1911 cities were authorized to condemn water rights in aid of fire protection;⁸² and to acquire water for irrigation uses.⁸³ Acts were also passed per-

⁷¹ *Avery v. Johnson*, 59 Wash. 332, 109 Pac. 1028 (1910). *In re Crab Creek and Moses Lake*, 134 Wash. 7, 235 Pac. 37 (1925). See, however, *Ortel v. Stone*, 114 Wash. 500, 205 Pac. 1055 (1922).

⁷² A discussion of riparian and appropriation water systems is contained in 28 Harv. L. R. 271, 36 H. *ibid.* 960; also, see *Sander v. Bull*, 76 Wash. 1, 135 Pac. 489 (1913).

⁷³ Sess. L. '90, p. 671, *ibid.* '95, p. 433; *ibid.* '13, p. 558; *ibid.* '15, p. 605, *ibid.* '17, p. 723; *ibid.* '19, p. 527 *ibid.* '21, p. 422; *ibid.* '23, p. 419; *ibid.* '25, p. 6; *ibid.* '27, p. 373; *ibid.* '29, p. 478; *ibid.* '31, p. 187.

⁷⁴ Sess. L. 1899, p. 261. Constitutionally upheld in *Weed v. Goodwin*, 36 Wash. 31, 78 Pac. 36 (1904).

⁷⁵ Sess. L. '99, p. 114 Am. L. '07, p. 562.

⁷⁶ Sess. L. 1901, p. 259.

⁷⁷ Sess. L. 1903, p. 270; also *ibid.* '07, p. 109; *ibid.* 19, p. 266.

⁷⁸ Sess. L. '05, p. 113.

⁷⁹ Sess. L. '05, p. 180; see note 26, *supra*.

⁸⁰ Sess. L. '07, p. 285.

⁸¹ Sess. L. '09, p. 721.

⁸² Sess. L. 1911, p. 442.

⁸³ Sess. L. 1911, p. 510. Cities and towns were authorized to acquire and construct public improvements involving the use of water as early as Sess. L. '90, p. 520. As amended, the act is embodied in Rem. Comp. Stat. 1927, Supp. §9488. P. C. §1214.

mitting dams and irrigation works;⁸⁴ remedying defects in commercial water way districts⁸⁵ including those previously established;⁸⁶ and providing for the construction of public waterways in the interests of navigation.⁸⁷ In that year, a resolution was passed, authorizing the printing of a proposed water code.⁸⁸ In 1913, in addition to making an appropriation for the Water Code Commission in connection with the drafting of the water code,⁸⁹ it authorized the establishment of districts to furnish water and power for uses other than irrigation;⁹⁰ it passed an act relating to protection against stream overflow;⁹¹ and amended statutes permitting cities to construct and operate public utilities in the utilization of water.⁹² In 1915, the Legislature amended the water district⁹³ and irrigation district acts,⁹⁴ the latter acts being again amended in 1917.⁹⁵

THE WATER CODE

The constant attention given by nearly every session of the state legislature to water problems indicated clearly the importance that the subject assumed in the minds of the legislators. However, the provisions made by the legislature for the use of water were not regarded as satisfactory.⁹⁶ In order to safeguard the maximum use of the water resources of the state, a water code based on the theory of appropriation was passed in 1917.⁹⁷ It was based in large measure

⁸⁴ Sess. L. 1911, p. 436.

⁸⁵ Sess. L. 1911, p. 11, cf. *ibid.* '09, Ex. Sess., p. 8.

⁸⁶ Sess. L. 1911, p. 10.

⁸⁷ Sess. L. 1911, p. 64.

⁸⁸ Sess. L. 1911, p. 658.

⁸⁹ Sess. L. '13, p. 672.

⁹⁰ Sess. L. '13, p. 533.

⁹¹ Sess. L. '13, p. 156, See Sess. L. '21, p. 747.

⁹² See note 83, *supra*.

⁹³ Sess. L. '15, p. 75.

⁹⁴ Sess. L. '15, p. 605. See note 74, *supra*.

⁹⁵ Sess. L. '17, p. 723. See note 74, *supra*.

⁹⁶ In *West Side Irr. Co. v. Chase*, 115 Wash. 146, 196 Pac. 666 (1921), it was said:

"It is well known that for many years much trouble arose over the right to take water for irrigation and domestic purposes. There were many private disputes and there was no adequate provision of law whereby prior rights of appropriators could be easily and satisfactorily settled and determined. From time to time the legislature of the state had enacted laws with a view of correcting the condition thus existing, but they were more or less fragmentary and did not fully meet the situation nor accomplish the purposes desired. In 1917 the legislature passed the so-called water code, which had been for years under consideration and which was intended to cover the whole field of irrigation and correct the abuses which had been inherent in earlier irrigation methods. The code appears to be broad enough to include almost any conceivable right with reference to irrigation and to provide an inexpensive and ready manner of settling all disputes concerning such matters."

⁹⁷ Sess. L. '17, pp. 447-468.

upon prior legislation and the legislation of other states,⁹⁸ and by its terms it abrogated all prior statutes in conflict with the code⁹⁹ including the Acts of 1890 and 1891.¹⁰⁰ Section 1 provided

“The power of the state to regulate and control the waters within the state shall be exercised as hereinafter in this act provided. Subject to existing rights all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise; and as between appropriations, the first in time shall be the first in right. Nothing contained in this act shall be construed to lessen, enlarge, or modify the existing rights of any riparian owner, or any existing right acquired by appropriation or otherwise. They shall, however, be subject to condemnation as provided in Section 4 hereof, and the amount and priority thereof may be determined by the procedure set out in Sections 14 to 26 inclusive thereof.”¹⁰¹

The State Hydraulic Engineer¹⁰² (and later the Supervisor of Hydraulics)¹⁰³ was made the administrative agency¹⁰⁴ by means of which the Code was enforced. He was empowered to issue permits for water appropriation¹⁰⁵ subject to right of appeal.¹⁰⁶ Provision was also made to use his services in judicial proceedings to determine rights to water.¹⁰⁷

The water code was amended in 1919,¹⁰⁸ 1921,¹⁰⁹ 1925¹¹⁰ and

⁹⁸ See note 96 *supra*.

⁹⁹ Sess. L. '17, p. 468.

¹⁰⁰ *Ibid*.

¹⁰¹ Appropriation under the 1917 Code is not exclusive. Hence an actual prior appropriation under Laws of 1891 is superior to an appropriation under the 1917 Code. In *re Crab Creek and Moses Lake*, 134 Wash. 7, 235 Pac. 37 (1925).

¹⁰² Sess. L. '17, p. 488, Sec. 5. Sec. 9 et seq. provides for assistance by water masters.

¹⁰³ Sess. L. '21, p. 68, abolished office of State Hydraulic Engineer, but by Sess. L. '21, pp. 38, 39, his duties were taken over by Supervisor of Hydraulics.

¹⁰⁴ *West Side Irr. Co. v. Chase*, 115 Wash. 146, 151, 196 Pac. 666 (1921) *Funk v. Bartholet*, 157 Wash. 584, 289 Pac. 1018 (1930). Under Sess. L. '07, p. 285, the duties of the water commissioner had been held administrative and ministerial, not judicial. *State ex rel. Bennett v. Taylor* 54 Wash. 150, 102 Pac. 1029 (1909). See 38 Harv. L. R. 447. The decisions of the Engineer and Supervisor of Hydraulics have been regarded with much respect by the Supreme Court. See *In re Crab Creek and Moses Lake*, 134 Wash. 7, 235 Pac. 37 (1925) *State ex rel. Gibson v. Supr. Ct.*, 147 Wash. 520, 266 Pac. 198 (1928) *In re Ahtanum Creek*, 139 Wash. 84, 245 Pac. 758 (1926). The administration of the Code is protected by the criminal law. See *State v. Lawrence*, 65 Wash., Dec. 426 (1931).

¹⁰⁵ Sess. L. '17, sec. 27 et seq.

¹⁰⁶ Sess. L. '17, sec. 11, Am. L. '19, Ch. 71 sec. 1.

¹⁰⁷ Sess. L. '17, sec. 14 et seq.

¹⁰⁸ Sess. L. '19, p. 141.

¹⁰⁹ Sess. L. '21, p. 303.

¹¹⁰ Sess. L. '25, Ex. Sess. p. 457.

1929¹¹¹—a period of fruitful legislation relating to the use of water.¹¹²

JUDICIAL POLICY OF BENEFICIAL USE OF WATER

During this period of legislative activity, it was becoming apparent that the policy of efficient and beneficial use of water was expressing itself clearly not only in legislation, but in decision. Invited to do so, the Supreme Court refused to hold that riparian rights could not be condemned under the Act of 1890 in furtherance of beneficial use. The statute authorized condemnation of all water except that needed by a riparian owner. The court defined the term "need" to include water needed at the time of condemnation and for a reasonable future time—two or three years.¹¹³ In *State ex rel South Fork etc. Co. v. Superior Court*¹¹⁴ it was held in an *en banc* decision that a riparian owner who intended to make beneficial use of water at some future time could not prevent another from condemning such rights pursuant to a proposed scheme to make immediate use of the water for power purposes. It was even held that a private owner of agricultural lands might condemn land for irrigation ditch purposes¹¹⁵ and condemn water¹¹⁶ to enable him to irrigate his own land.

¹¹¹ Sess. L. '29, p. 269.

¹¹² In 1919, the Legislature authorized the diversion of water across the lines of a state reciprocating (Sess. L. '19, p. 85) and provided for the dissolution of water user associations in certain cases (Sess. L. '19, p. 863—see note 79 *supra*). In 1921 an act was passed relating to the distribution of water for irrigation purposes. (Sess. L. '21, p. 313). In 1923, an amendment to the act was passed by which cities were authorized to condemn public utilities, including water rights (Sess. L. '23, p. 570) and an amendment to the commercial waterway district act was likewise enacted (Sess. L. '23, p. 97). In 1925, provision was made for the appointment of stream patrolmen (Sess. L. '25, p. 460). In 1927, the Legislature passed the Reclamation District Act (L. '27, p. 402) and specifically repealed a number of obsolete and other statutes relating to water (Sess. L. '27, pp. 26, 61, 46, 37, 100). In 1929, statutes were passed amending the act regulating the flow of water from artesian wells (Sess. L. '29, p. 356) amending the act relating to the appropriation of water for use in connection with federal reclamation projects (Sess. L. '29, p. 183) validating water districts created under 1913 act and authorizing the establishment of water districts under the new act (Sess. L. '29, p. 218). In addition, it provided for an annual license fee from users of water for power development purposes (Sess. L. '29, p. 205). In 1931, provision was made to protect water districts previously established (Sess. L. '31, p. 222) and to be established (Sess. L. '31, p. 223). In that year, also, the people of this State adopted the Power and Water District Act (Sess. L. '31, p. 1). For irrigation statutes, see note 74 *supra*, and Sess. L. '25, p. 193; also *ibid.* '97, p. 207, and *ibid.* '99, p. 164.

¹¹³ *State ex rel. Liberty Lake Irr. Co. v. Supr. Ct.*, 47 Wash. 310, 91 Pac. 968 (1907). The Court said:

"It is not to the state's interest that the water of a non-navigable stream should be idle or going to waste because one of its citizens unjustifiably neglects to avail himself thereof, while others stand ready and willing, if permitted, to apply it to the irrigation of their arid lands."

¹¹⁴ 102 Wash. 460, 173 Pac. 192 (1918).

¹¹⁵ *State ex rel. Galbraith v. Supr. Ct.*, 59 Wash. 621, 110 Pac. 429 (1910).

¹¹⁶ *State ex rel. Anderson v. Supr. Ct.*, 119 Wash. 406, 205 Pac. 1051 (1922).

There were other decisions disclosing the policy of highest beneficial use. In *Northport Brewing Co. v. Perrot*¹¹⁷ it was held that one claiming riparian rights could not defend against a suit for injunction by a water appropriator when he failed to allege that he was making beneficial use of the water.¹¹⁸ In *Prescott Irr Co. v. Flahers*¹¹⁹ it was pointed out that *Benton v. Johncox* did not involve surplus or overflow waters from the channel of a stream.¹²⁰ It was again held that water between high and low water mark of a navigable lake was subject to appropriation for irrigation purposes, nor would a riparian owner, as such, have rights of appropriation in navigable waters superior to anyone else who could make beneficial use.¹²¹ But appropriation, the cases held, to be effective had to be diligently pursued. It was not to the state's interest to let waters flow idly by¹²²

THE CASE OF BROWN V CHASE

In line with the policy of highest beneficial use, the Water Code had adopted the theory of appropriation. It was under that Code that the conception of riparian rights received a decided modification. "Existing rights" had been expressly saved from mutilation when the act was passed. It was soon decided that the right of condemnation was not retroactively conferred by the Code¹²³ nor would cases be affected by its provisions, jurisdiction of which had attached prior thereto.¹²⁴

In 1923, the court decided the famous case of *Brown v. Chase*,¹²⁵ a landmark in the Washington law of riparian rights. In that case, it was held that the Supervisor of Hydraulics properly granted a water permit to an irrigation district to appropriate 625 second feet of water in the Wenatchee River, a non-navigable stream, for irrigation purposes on non-riparian land. The trial

¹¹⁷ 22 Wash. 243 60 Pac. 403 (1900).

¹¹⁸ In *Methow Cattle Company v. Williams*, 64 Wash. 457, 117 Pac. 239 (1911) the court refused to restrain the use of water diverted from a creek for irrigation purposes where riparian owner suffered no damage from such diversion. cf. note 57, *supra*. In *Wintermute v. Tacoma L. & W Co.*, 3 Wash. 727, 29 Pac. 444 (1892), an injunction was denied where it was not shown that abutting owners would suffer actual injury from diversion of water.

¹¹⁹ 20 Wash. 454, 55 Pac. 635 (1899) also, see *Kalez v. Spokane Val. Land etc. Co.*, 42 Wash. 43, 84 Pac. 395 (1906).

¹²⁰ *Ortel v. Stone*, 119 Wash. 500, 205 Pac. 1055 (1922).

¹²¹ *State ex rel. Ham, Yearsley etc. v. Supr Ct.*, 70 Wash. 442, 126 Pac. 945 (1912)

¹²² See notes 68, 113 and 121, *supra*, also *Nelson v. Spooner*, 46 Wash 14, 89 Pac. 155, 123 Am. St. Rep. 910 (1907).

¹²³ *State ex rel. Mason County P Co. v. Supr Ct.*, 102 Wash. 291, 173 Pac. 19 (1918).

¹²⁴ *Pate v. Peterson*, 107 Wash. 93, 180 Pac. 894 (1919).

¹²⁵ 125 Wash. 542, 217 Pac. 23 (1923).

court, relying upon the common law view of riparian rights,¹²⁶ had held that such a permit could not be issued as against a protesting riparian owner, even though there was ample water in the river to satisfy his needs after the proposed appropriation. The Supreme Court reversed the decision of the trial court after a discussion of the authorities and announced a doctrine contrary to many earlier expressions on the subject,¹²⁷ but supported to some extent by earlier decisions.¹²⁸ The court held

"* * * in consonance with the general needs and welfare of the state, especially in the arid and semi-arid regions, and in harmony with legislation upon the matter, we are now prepared to declare, instead of the mere loose and general expressions in some of our opinions that (1) waters of non-navigable streams in excess of the amount which can be beneficially used, either directly or prospectively, within a reasonable time, on, or in connection with riparian lands, are subject to appropriation for use on non-riparian lands."

THE SUBSEQUENT HISTORY OF *BROWN v. CHASE*

The full significance of the new definition of riparian rights was to be more clearly demonstrated in the cases that followed. By the new definition, it became possible to argue that whereas the appropriator *gained* his right to the use of water by diligently and beneficially using the same, the riparian owner *retained* his right to the use of water by diligently and beneficially using the same. In other words, as suggested in *In re Sinlahekm Creek*¹²⁹ non-user

¹²⁶ The trial court stated the law as follows:

"The right of riparian flow covers the normal flow in flood stage and low water. Being an incident of ownership inseparable from the soil except by consent of the owner or by condemnation, use cannot create nor disuse destroy any more than failure to improve or cultivate the land would destroy the fee in the owner or subject it to rights of third persons without the owner's consent except as an adverse user might do so."

¹²⁷ See *In re Sinlahekm Creek*, 162 Wash. 635, 299 Pac. 649 (1931)

¹²⁸ The opinion refers to some of these. Others are discussed *supra*.

¹²⁹ 162 Wash. 635, 299 Pac. 649 (1931) This case involved a dispute concerning water rights between riparian owners and appropriators. The majority opinion inclines to the view that non-user works a forfeiture of riparian right. Tolman, C. J., dissenting from the departmental decision, said.

"In my judgment, riparian rights are not governed by the law of user, and cannot be lost by mere non-user. So far as the judgment appealed from is sustainable upon the theory that water cannot be beneficially used either now or in the future upon the riparian lands, I concur, but I cannot as now advised, lend my assent to the principle that mere non-user, of itself, is a forfeiture of the natural riparian rights created and provided by nature."

In *State v. American Fruit Growers* 135 Wash. 156, 237 Pac. 498 (1925) the court refused to award water to riparian owners for irrigation purposes because of failure to prove present or prospective use of water for such purposes.

See also note 126, *supra*, in which trial court view in *Brown v. Chase* was rejected by Supreme Court. In appropriation cases, mere non-user without intent to abandon does not work a forfeiture. *Sander v. Bull*, 76 Wash. 1, 135 Pac. 489 (1913).

worked a forfeiture.

In *Proctor v. Sim*¹³⁰ the court expressly refused to depart from *Brown v. Chase* and held that surplus waters in a non-navigable lake might be appropriated under the Water Code for use on non-riparian lands, even though the bed and banks were owned by one riparian owner. The "existing rights" saved by the water code were rights as defined in *Brown v. Chase*.¹³¹

In *State v. American Fruit Growers*¹³² the court again refused to depart from *Brown v. Chase* and affirmed a decree refusing to award riparian owners water for agricultural purposes because such owners failed to prove a present or prospective use of water for such purposes. The court said. "In other words, the riparian owner, before he has any rights to protest, must with reasonable certainty, show that either at present or within the near future, he will make use of the water for irrigation purposes."

The court further held that a showing of fitness for use of water is not enough. There must be a showing of intention to make beneficial use.

*Hunter v. Langenour*¹³³ continued to apply the rule of *Brown v. Chase*. It discussed riparian and appropriation rights and held that water might be appropriated under the Code for use on non-riparian land even against the objection of a riparian owner where the water appropriated was in excess of the amount that could be beneficially used by the riparian owner, i. e., surplus water.

The doctrine of *Brown v. Chase* and the cases that followed it raised two important questions. The first question was whether water in excess of present and prospective need, i. e., surplus water, could be appropriated under the Code without compensating the riparian owner. In *Funk v. Bartholet*¹³⁴ it was held that the issuance of a water permit by the Supervisor of Hydraulics was not an adjudication of private rights, being effective only against the State. In fact, in *Eikenbary v. Calispel Light & Power Co.*¹³⁵ it was held that the recovery of damages for wrongful diversion of waters was

¹³⁰ 134 Wash. 606, 236 Pac. 114 (1925)

¹³¹ Cf. statutory definition of rights saved by the Oregon Water Code set out in *In re Hood River*, 227 Pac. 1065, 1089 (1924).

"Actual application of water to beneficial use prior to the passage of this act by or under authority of any riparian proprietor, or by or under authority of his or its predecessors in interest shall be deemed to create in such riparian proprietor a vested right to the extent of the actual application to beneficial use."

This definition was held constitutional in *In re Hood River*, *supra*. See 40 Harv. L. Rev. 1023.

¹³² 135 Wash. 156, 237 Pac. 498 (1925).

¹³³ 140 Wash. 558, 250 Pac. 41 (1926).

¹³⁴ 157 Wash. 584, 289 Pac. 1018 (1930).

¹³⁵ 132 Wash. 255, 231 Pac. 946 (1925).

not precluded by the issuance of a permit under the Water Code. Whether the riparian owner was making beneficial use of water does not clearly appear. In the case of *In re Martha Lake*¹³⁶ it was likewise held that the Supervisor of Hydraulics could not issue a permit to appropriate water of a non-navigable lake to the substantial injury of riparian owners making beneficial use of the water without acquiring the right to appropriate by condemnation.¹³⁷ Yet in *Proctor v. Sim*¹³⁸ the court refused to allow damages in trespass against one who appropriated *surplus* water of a non-navigable lake.

The right to appropriate surplus waters given by the Water Code coupled with the definition of "surplus water" given in *Brown v. Chase* and cases following it, leads to the conclusion that no compensation need be made by a water appropriator of surplus waters—compensation being required only when riparian rights as defined in *Brown v. Chase* are invaded by adverse appropriation.¹³⁹

The second question raised was far more difficult—and has not yet been answered. The question was this From what date is the prospective use to begin to run in determining the existence or *quantum* of riparian right?

In appropriation cases the answer was not difficult. Prior to the Water Code, it was generally held that future needs might be calculated from the time that steps were taken to ultimately use a given quantity of water.¹⁴⁰ Under the 1917 code, it was provided that the right acquired by appropriation relates back to the date of filing the original application for a permit in the office of the Supervisor of Hydraulics.¹⁴¹

What, however, could the test be in cases of riparian rights? To apply the measure of *Brown v. Chase* to riparian rights when they first came into private ownership from the federal or state government would obviously work hardship on those who acquired those rights in the beginning or through subsequent owners on faith of the common law conception. And if the doctrine of forfeiture by non-user¹⁴² suggested since *Brown v. Chase* were strictly applied, it would work great havoc with those riparian owners who had made no use or limited use or late use of their rights.

¹³⁶ 152 Wash. 53, 277 Pac. 382 (1929)

¹³⁷ See case of *Domrese v. Roslyn*, 101 Wash. 372, 172 Pac. 243 (1918) holding same view prior to *Brown v. Chase*; also, *Wintermute v. Tacoma L. & W. Co.* 3 Wash. 727, 731, 29 Pac. 444 (1892).

¹³⁸ Note 130, *supra*.

¹³⁹ See note 137, *supra*.

¹⁴⁰ *Hunter Land Co. v. Langenour* 140 Wash. 558, 250 Pac. 41 (1926). *Sumner Lumber & Shingle Co. v. Pac. Coast Power Co.*, 72 Wash. 631, 131 Pac. 220 (1913)

¹⁴¹ Sess. L. '17, p. 463, sec. 35.

¹⁴² See note 129, *supra*.

On the other hand, to follow the analogy of appropriation, and make the date begin to run from the date that beneficial user was commenced, or from the date that someone else desired to make beneficial use of water by appropriation or by resort to condemnation proceedings or by action of trespass or for injunction would make the existence and quantum of riparian right dependent on the uncertainties of need and on the chance that litigation would be started.

In this condition of uncertainty legislation is needed to define riparian rights and to determine the date from which prospective use is to begin to run. Such legislation, combining the definition of the Oregon Water Code¹⁴³ with that of *Brown v. Chase* might well provide that the surplus water subject to appropriation under the Water Code is all unappropriated water except such as has been actually applied to beneficial use prior to the passage of the new act together with the reasonable needs of riparian owners for a period of three years thereafter. Such an act would seem to be a legitimate exercise of police power.¹⁴⁴

* * * * *

Other problems undoubtedly await solution when the time comes to require their solution. Meanwhile, however, the history of water right legislation and decision has unquestionably established the principle that that solution will be adopted which most nearly conforms to the needs of the state in the beneficial use of water. *Benton v. Johncox* rejected the *sociological* and accepted the *logical* solution of the water right question. *Brown v. Chase* and cases which have since followed it have decidedly reversed the emphasis. The common law which met the needs of the humid country came to be regarded in the course of its judicial history in Washington as "incompatible with the institutions and condition of society in this state." That the history of water rights has not yet reached its final chapter is obvious, and one may safely predict that an interesting story lies before us.¹⁴⁵

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¹⁴³ See note 131, *supra*.

¹⁴⁴ See 40 Harv. L. Rev. 1023.

¹⁴⁵ The argument in favor of appropriation doctrine is forcibly set out in I KINNEY ON IRR. AND WATER RIGHTS (2 ed. 1912), Sec. 594; see, also, "Theories of Water Law," 27 Harv L. R. 530.

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